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SUPREME COURT, U.S.

NO. 80-5263

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

LISA BULLWINKLE,

Appellant,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal for the Second Appellate District of California

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS[1]

Appellee State of California, in moving "to dismiss or affirm" the instant appeal, has solely attacked the substantiality of the questions presented.[2] (Motion to Dismiss

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1. No basis exists in the rules of this Court to move "to affirm," at this stage of the proceedings, a judgment of a state court. Compare rule 16.1(b) with rule 16.1(c); the latter section is only applicable to appeals from federal courts. The motion will be treated as one to dismiss.

2. In paraphrasing the Questions Presented, the Appellee has seriously misstated the first of them. The statutes challenged were not construed to allow booking searches,

[Fn. 2 cont'd.]

at pp. 14-15, 23, 29.) All other jurisdictional bases are apparently conceded.[3]

In arguing that this Court lacks jurisdiction because no substantial federal question is presented, however, the Appellee does not fairly meet the questions raised by the opinion of the court below nor those raised by Chadwick[4] and Sanders.[5] Thus, though Appellee asserts that the mandate of California Penal Code section 1412 and Government Code section 26640 is so strong as to raise an irrebuttable presumption that the purse would have been searched by Officer Alpert (Motion to Dismiss at pp. 13, 24-25), nowhere does Appellee explain how the relevant evidence, actually discovered by Officer Rogers, would have been discovered had this been an actual booking search (compare, Jurisdictional Statement at pp.

[Fn. 2 cont'd.]

(Motion to Dismiss at p. i) but to mandate them after every felony arrest (Jurisdictional Statement at p. i, pp. 17-24). If the statutes only "allow" such searches, no basis, constitutional or otherwise, exists in this case for the factual finding that the purse would have been searched.

3. Including the timeliness of the appeal, though Appellee has misread the date of the order of the California Supreme Court (Motion to Dismiss at p. 3). The correct date, June 25, 1980, is evidenced by the file stamp of that Court on the order attached to the Jurisdictional Statement as exhibit H. The notice of appeal was filed the following day. (Exhibit I.)

4. United States v. Chadwick, 433 U.S. 1 (1977).

5. Arkansas v. Sanders, 442 U.S. 753 (1979).

32-33). To finesse that question, Appellee asserts that "the fact that a thorough search of the booking type occurs prior to the actual booking process does not render the search illegal, since no additional invasion or greater intrusion of the privacy of the suspect is involved." (Motion to Dismiss at pp. 7-8.) This statement mixes the analysis of two different types of search. Those "of a booking type" may (if a booking search of this kind of property is ever constitutional) represent a true inevitable discovery, and would not be the pretext search condemned in Opperman.[6/] The last part of the quoted sentence, however, coming from the opinion in the case at bar, is a rationale designed to get around the Opperman pretext search criticism and is necessary, both to the opinion below and to the Appellee's Motion, precisely because the search in the instant case was not a "booking type," but a generalized search for evidence. Appellee never comes to grips with the Opperman language quoted in the Jurisdictional Statement (at p. 23) or with the fact that the kind of pretext search which occurred here was precisely the kind distinguished in Opperman.

Appellee attempts to distinguish Chadwick and Sanders on the grounds that a purse, searched distant from the scene of the arrest[7/] is the kind of item this Court spoke

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6. South Dakota v. Opperman, 428 U.S. 364, 373, 375 (1976).

7. Appellee's statement that the purse was searched "before appellant and her husband were transported to the police station" (Motion to Dismiss at p. 5) fails to acknowledge either the time or distance which passed from the time [Fn. 7 cont'd.]

of in the Chadwick dicta quoted by Appellee at page 17. Yet Appellee nowhere addresses itself to the fact that this Court specifically reserved precisely this question in footnote 11 of Sanders, noting that, as in the instant case, "the bag was not within [the defendant's] 'immediate control' at the time of the search." (Sanders, id., emphasis added; see also the conc. opn. of the Chief Justice.) Likewise, though it discusses United States v. Robinson, 414 U.S. 218 (1973)(Motion to Dismiss at pp. 21, 22, 23, 27), the Motion to Dismiss does not acknowledge the qualifications placed on that case in footnote 10 to the Chief Justice's opinion in Chadwick (Chadwick, supra, at 16), nor those placed on United States v. Edwards, 415 U.S. 800 (1974) in that same footnote.

Finally, the Motion to Dismiss relies on Abel v. United States, 362 U.S. 217 (1960). In so doing, Appellee leapfrogs the Court of Appeal opinion and returns once more to the question originally raised at the trial level in this case, whether a container which could have been, but was not, searched incident to an arrest can be searched later; stated another way, the Appellee has raised the question of whether Chadwick and Sanders have overruled, sub silentio, that aspect of Abel, a case determined in the infancy of the development of Fourth Amendment law. Footnote 11 of Sanders has, at least, called into question the continuing vitality of that "notorious" decision (Abel, supra, Brennan, J., dis. at 248), and this question, alone, is substantial enough to require argument.

[Fn. 7 cont'd.]

and scene of the arrest to that of the search. (Jurisdictional Statement at 13-14.)

CONCLUSION

Appellant recognizes that in the structure of a Motion to Dismiss it would be difficult to address even these highlighted questions, let alone finer ones which may remain.[8/] The very inability to do so, however, in a short statement, attests to the substantiality of the Questions Presented and to the need for this Court to address them after full briefing and argument. The appellant therefore respectfully urges that the Motion to Dismiss or Affirm be overruled, and that this case be placed on the argument calendar.

DATED: October 7, 1980.

Respectfully submitted,

QUIN DENVIR
State Public Defender

By _____
ROBERT P. APP
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Member of the Bar of the
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8. Though Appellant will have renewed opportunity to do so in its response to the Jurisdictional Statement filed in Edward Bullwinkle v. California, No. 80-5456.

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CERTIFICATE OF SERVICE

Undersigned, a member in good standing of the bars of California and the Supreme Court of the United States, hereby certifies that service of the Appellant's Brief in Opposition to Motion to Dismiss has been made, pursuant to rule 28.3, on all parties required to be served, through their counsel, this 7th day of October, 1980, by placing copies thereof in the United States mail, first class postage prepaid, addressed to:

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